
(2014) 07 BOM CK 0301

In the Bombay High Court

Case No : Criminal Appeal Nos. 392 and 512 of 1992 and Suo Moto Revision
Application No. 10 of 1992

Vilas Dhondu Nichite

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 24-07-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 324, 34, 376, 376(2)(g), 376(g)

Citation : (2014) ALLMR(Cri) 4220

Hon'ble Judges : P.V. Hardas, J; Anuja Prabhudesai, J

Bench : Division Bench

Advocate : H.J. Dedhia, APP, Advocates for the Respondent

Judgement

P.V. Hardas, J.—Appellant/Original accused No. 1 who stands convicted for the offence punishable under Section 376 r/w. 511, 452, 324 and 506 of Indian Penal Code and sentenced to rigorous imprisonment for three years and to pay fine of Rs. 500/- i.d. to undergo rigorous imprisonment for six months, by the VIIIth Addl. Sessions Judge, Thane, by judgment dated 30.06.1992, in Sessions Case No. 475 of 1991, by this appeal questions the correctness of his conviction and sentence. The facts as are necessary for the decision of this appeal may be stated thus:

P.W. 11 P.I. Ashok Wankhede, who on 3.2.1991 was attached to Shahapur Police Station, recorded the complaint of P.W. 1 victim (whose name is deliberately withheld) at Exhibit 11. On the basis of the said statement, offence vide Crime No. 56 of 1991 under Section 376(g), 324, 452, 506 of Indian Penal Code was registered. P.W.11 P.I. Wankhede proceeded to the scene of incident and drew scene of incident panchanama at Exhibit 41. The victim was referred for medical examination under requisition at Exhibit 42. Statements of witnesses were recorded and search of the accused was undertaken. The other accused were arrested and the clothes were seized under seizure memo at Exhibit 23. The accused were referred for medical examination and on 11.2.1991. The appellant

was arrested under arrest panchanama. The appellant was referred for medical examination under requisition at Exhibit 47. During custodial interrogation the appellant expressed his willingness to point out the place where the knife had been concealed. Accordingly, memorandum at Exhibit 27 was drawn. The appellant led the police and the panchas to his house and produced the knife which was seized under seizure memo. The knife is at Article 16. The Naib Tahsildar was requested to conduct the test identification parade. The seized property was referred to the Chemical Analyser under requisition at Exhibit 49. Further to the completion of the investigation chargesheet against the appellant was filed.

2. The appellant was examined by P.W. 10 Dr. Janardan Nimbore, who had noticed the following injuries:

"Abrasion over left thumb 3 cm x 2 cm x 1 cm tenderness was present. There was teeth bite on the left thumb."

According to him the injury can be caused by hard and blunt object. The injury certificate is at Exhibit 35.

The pubic hair and semen samples of the appellant were also obtained.

3. The test identification parade was conducted by P.W.9 Executive Magistrate Vasant Kamble. Initially the victim could not identify any of the accused. Janibai identified the appellant and wrongly identified the two dummies as A2 and A4. Zipribai could not identify any of the accused. Similarly, Chaitybai also could not identify any of the accused.

4. The victim was examined by P.W.7 Dr. Nagrajan Sitaram, who noticed that there was a old tear to the hymen and the vagina admitted two fingers. He did not notice any external injury and therefore could not opine if the victim had been ravished. She had also examined P.W.2 Janibai and had noticed that she had sustained contused lacerated wound 1" x 1/2" over the right maxillary region bone deep, and had sustained contusion 1/2" x 1/2" over the left frontal region.

5. On committal of the case to the Court of Session, the trial court framed charge against the accused vide Exhibit 3 for offence punishable under Section 452, 376(2)(g), 324 r/w. 34 and 506 r/w. 34 of I.P.C. The accused denied their guilt and claimed to be tried. The prosecution, in support of its case examined 11 witnesses to establish that the accused had committed rape on the victim P.W. 1. The trial court accepted the evidence of the prosecution and convicted and sentenced the appellant as aforestated while acquitting the other accused.

6. With the assistance of the learned APP Mr. Dedhia, we have perused the evidence of the witnesses. P.W.1 victim deposes that she was residing along with her mother P.W.2 Janibai, her grandmother Zipribai and Tulsabai and her cousin Ramesh. According to her, her parents used to go for labour work in the agricultural field of accused No. 1 Vilas, which was situated at Valshet. The agricultural field was owned by Dhondurichite who was father of accused No. 1.

According to her on the date of the incident i.e. on 2.2.1991 in the night time she, her mother, grandmother and others were sleeping in the hut which had been constructed of straws. They were awakened on hearing the noise of the door being forcibly opened. According to the victim accused No. 1 entered the hut alongwith others. Her mother was awakened and she started crying for help. She further deposed that thereafter accused No. 1 lit a matchstick and in the light of the matchstick she noticed the accused No. 1 and other three present in the hut. According to the victim, on seeing the intruders in the hut her mother and grandmother started crying for help. Accused No. 1 threatened her mother that in case she shouted he would cause some injury to her and therefore her mother Janibai was frightened and went out, the other accused also brandished knife at the grandmother and she also left the hut. Similarly, Tulsabai also left the hut. According to the victim she tried to run away, but the accused tied her to the pole of the hut and forcibly denuded her and all the accused committed rape on her. On the next day in the morning after about one hour of the incident her mother, grandmother and Tulsabai returned back to the hut and the victim narrated the incident to them. Thereafter in the morning they had gone to the police station and lodged their report. In the cross examination it has been elicited that the Jayeshree Paints Company was located at a distance of about 200-300 feet from her hut. She has also admitted that another factory i.e. Indo Borax Company was situated at a distance of 800 feet from her hut. She has also admitted as correct that Indo Borax Company was run in three shifts. She has admitted as true that the watchman of Indo Borax Company are normally present at the Gate. She has admitted that when the accused entered the hut it was dark in the hut. She states that accused No. 1 lit a matchstick and in the glow of the matchstick she identified accused No. 1. In the further cross examination she has admitted that the matchstick was lighted not by the accused No. 1, but by some other accused. It is admitted that after the matchstick was burnt the matchstick was thrown on the ground and it was dark once again. An omission has been elicited that she has not stated in the report that she was tied to the pole by the accused. It was suggested to her that since they had asked for loan from the employer and the employer had declined to accede to the request they had lodged false report.

7. Prosecution has examined P.W.2 Janibai, mother of the victim. She also deposes that on the day of the incident she was sleeping in the hut which was occupied by the victim and the mother of the victim Janibai, as well as one Tulsabai, her husband's sister. According to her the door was suddenly broken open and therefore on hearing the noise of the door being broken she and the other inmates of the hut were awakened. She then deposes that a matchstick was lighted by the accused No. 1 and in the glow of the matchstick she identified accused No. 1. She then deposes that the accused threatened her and her mother and thereafter both of them left the hut. She states that they returned back to the hut and they noticed the victim lying on the ground. On being questioned, the victim narrated as to what had happened. She claims that she

had been called to the Tahsil office for test identification parade and had identified accused No. 1. Learned APP sought permission of putting leading questions without declaring the witness hostile.

8. In cross examination she has admitted that the hut is separated in two sections. The first room was the room where she was sleeping, while the second room was the kitchen. She has admitted that she was sleeping in the front room while the victim was sleeping in the kitchen. She has then admitted in the cross examination that while the accused were going in the kitchen they had lit the matchstick and the back of the accused was towards her. She has then admitted that the matchstick was lighted but it was extinguished immediately. She has admitted that when the accused No. 1 and the other accused entered the hut she had not shouted for help. She has admitted that when the accused No. 1 dragged the victim in the front room they had started shouting but the accused No. 1 threatened them not to shout and therefore they fled from the house. She has stated that she had gone towards the Indo Borax Company and then at the petrol pump and was at the petrol pump for about half an hour and had thereafter returned to the hut. She has admitted that after returning to the hut they had slept and had then gone to the police station in the morning. She has also admitted that in the meantime they had not informed the incident to anyone else.

9. The prosecution has examined P.W.3 Tulsabai who did not support the prosecution and was declared hostile. She has denied to have witnessed any incident. P.W.4 Zipari Tigare, mother of P.W.2 Janibai also deposes about 3-4 intruders entering into the hut. She then deposes that as soon as the accused entered the hut and threatened her, she started running towards the petrol pump. P.W.2 Janibai and others followed her. She stated that they waited at the petrol pump for about one hour and thereafter returned home. Importantly, this witness does not state anything about the accused No. 1 lighting the matchstick and the witness getting an opportunity of observing the accused in the glow of the matchstick. In the cross examination the witness admitted that her vision is poor at night. She has denied the suggestion that on reaching the hut they slept in the hut for some time and thereafter went to the police station. She was confronted with the portion of her previous statement where she had admitted that they had slept in the hut and thereafter gone to the police station.

The report of the Chemical Analyser indicates that no semen had been observed in the vaginal swab of the victim, though the victim had claimed that all the accused had discharged their semen.

10. The evidence of the victim P.W.1., as well as P.W.2. Janibai, P.W.3. Tulsabai, P.W.4 Zipri tasks human credulity for its acceptance. We find it impossible to believe that P.W.2 Janibai as well as the other ladies would abandon the victim to the mercy of the accused and would just wait at the petrol pump for one hour and thereafter return to the hut. These witnesses had made no attempt for calling for help or going to the factory and summoning help. The conduct of

these witnesses is extremely unnatural. We, therefore, find that no reliance at all can be placed on the testimony of the prosecution witnesses. The identity of the accused also appears to be doubtful. It is difficult to believe that the accused lighted matchstick and in the glow of the matchstick the witness could identify the accused No. 1. P.W.2 Janibai has admitted that the matchstick was lit by the accused while entering into the kitchen, whereas the victim has claimed that the matchstick was lit in the front room. There is total variance about at the matchstick being lit by accused No. 1. The recital in the FIR claims that the matchstick was lit by accused other than accused No. 1. P.W.2 Janibai does not refer to the lighting of the matchstick. The medical evidence also does not support to the prosecution that gang rape was committed on the victim. The report of the Chemical Analyser also does not support or corroborate the case of the victim. We thus find that the evidence of the victim as well as other witnesses is extremely artificial and implicit reliance cannot be placed on the said testimony. In our opinion, therefore, the appellant is entitled to be given benefit of doubt.

11. Accordingly, Criminal Appeal 392 of 1992 is allowed and the conviction and sentence of the appellant is hereby quashed and set aside and the appellant is acquitted of the offence for which he was charged and convicted.

Fine, if any, paid by the appellant be refunded to him.

His bail bond stands cancelled.

12. Criminal Appeal No. 512 of 1992 filed against acquittal of the other accused is dismissed as we find that there is no evidence whatsoever in respect of the other accused. The Suo-moto Criminal Revision Application No. 10 of 1992, for the reasons stated in this judgment is also dismissed.